Basanti Lal vs. Mst. Phaphi & Ors.

SB Civil 1st Appeal No.09/1989

Date of Judgment: 08th May, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.R.K.Thanvi for the appellant.
Mr.J.L.Purohit for the respondent/s.

Heard learned counsel for the parties.

This appeal is preferred by the appellant against the judgment and decree dated 12.12.1988 passed by the Additional District Judge, Rajsamand, in civil original suit No.10 of 1982.

The appellant-plaintiff, in the suit filed by him , contended that a house owned and possessed by the defendant-respondent was mortgaged to him for consideration of Rs.10,000/- . The mortgage deed was registered after execution by the defendant -respondent. Yet he had neither parted with the possession nor permitted the plaintiff appellant to make use of the house. Therefore, it was prayed in the suit that the plaintiff should be awarded monthly

mesne profit, and the arrears as well.

The defendant-respondent contested the suit and submitted that the mortgage deed was neither for consideration, nor any related action had taken place in relation to the mortgage, nor has he handed over the possession, because the plaintiff had promised that he will give Rs.10,000/- to the defendant-respondent yet he did not do so and when the defendant- respondent waited for two-three days and the plaintiff started repudiating the claim, a notice was sent to the plaintiff on 23rd May 1980 that he had not given money. He sent a wrong reply. On 18.05.80 yet another document of sale was got registered in the name of the brother of the appellant of the same property. A suit has already been filed to annul that sale deed. In the background of the defence of the respondent-defendant, it was claimed that the suit is not liable to be decreed.

On the basis of the pleadings of the parties, the following issues were framed:-

> "1-क्या रहन नामा वादी द्वारा रूपया न देने, न बैंक में जका कराने या कर्ज दार को चुकाने के कारण बिला बदल है, व उसका क्या प्रभाव है ?

2- क्या विवाद्यक नम्बर-1 प्रतिवादी के विरूद्ध तय होने पर वादी वाद पत्र में वर्णित जायदाद रहन नामे के आधार पर उसके कब्जे व हर्जाने का अधिकारी है।

3- प्रतिकार क्या होगा।"

In support of the case, the plaintiff examined three witnesses and the respondent examined four witnesses. After considering the case of both the parties on issue No.1, the trial court came to the conclusion that the consideration for mortgage was not passed on to the defendant because the witnesses of attestation, and supporting witnesses had not categorically stated that in their presence money was paid. Further the trial court has noticed that within few days of the execution , a notice was given by the defendant respondent regarding the non-receipt of money and in this background the trial court was of the opinion that Annx.1 mortgage deed was written without consideration. This has also been observed by the trial court on the strength of the statement of the plaintiff himself that possession was not handed over to the plaintiff though the execution of the document is admitted but the

consideration having not passed, and possession having not been handed over, it was categorically observed by the trial court that the mortgage deed was without consideration. Thus, issue No.1 was decided against the plaintiff.

After having decided issue No.1 against the plaintiff the trial court decided issue No.2 and held that notwithstanding the fact that since money was not paid the defendant was not entitled to any title over the property in question.

In issue No.3 , the trial court, however, ordered that if the plaintiff pays a sum of Rs.10,000/- then he is entitled to receive the possession. For doing so, one month's time was granted to the appellant. At the time when the appeal was filed by the appellants it appears that the appellant has not deposited the money in question within the time granted to the appellant . A stay order was granted by this Court on 10.01.89 staying the operation of the decree. Thus, it appears that it was not necessary for the appellant to have followed the directions of the trial court for the deposit and payment.

The learned counsel for the appellant, arguing the appeal, urged that the finding regarding possession , though, based on the

admission of the appellant, the trial court had gone wrong in assuming that payment was not made in cash. The varying statements of these witnesses cannot be read so seriously against him so as to discredit the written document Ex.P/1. When the appellant admits the execution of the document, its contents should be accepted to be true.

Per contra, the learned counsel for the respondent, supporting the findings of the trial court, submitted that on 05th May, 1980 a notice was given by the respondents and that document becomes relevant with the testimony of PW/2 Mangilal who says that Rs.10,000/- were given to the defendant in his presence.

PW/3 Fateh Lal says that money was not given in his presence. At the time when he signed, the other signatures had already been made, i.e. Mangilal has been found to be a contradicting other witness and on this count the trial court has come to the conclusion that when the fact of giving possession has been wrongly recorded, other fact can also be wrongly recorded. The statement of plaintiff has been taken note of by the trial court wherein it is stated that the defendant was with him when the stamps were purchased and in the next breath he says that he was not with him.

Thus, after considering the entire tenor of the evidence, the trial court has held that the document was without consideration.

I have examined the arguments advanced by the learned counsel and has read the evidence of the witness.

The facts of passing on of the money has not been denied by any of the witness , including the plaintiff . The manner and execution of the document has also been stated in the statement of the witnesses of the plaintiff. A notice was given by defendant-respondent forthwith, alleging that the money was not paid and in that background the finding of the trial court are not liable to be disturbed , more particularly when the plaintiff himself admitted that the possession was not handed over and it was only in that light that such events are written in the document as routine and, therefore, it was very important aspect that the handing over of the possession has been wrongly recorded. And in that background, the finding of the trial court on issue No, 1 are not liable to be disturbed.

Arguing on the findings on issue No.2, the learned

counsel for the appellant stated that in case the appellant has not paid the consideration, the defendant can ask for consideration and after paying the consideration he can have possession of the property. He has cited in support of his case a case decided by the Hon'ble Supreme Court in the matter of Vidyadhar vs. Manikrao and another (1999)3 SCC573 wherein the Hon'ble Supreme Court has observed that the actual payment of full price at the time of execution of sale deed is not a sine qua non for completion of sale. Real test is the intention of the parties in execution of the document. .

The learned counsel for the appellant has further relied on a Supreme Court decision decided in the matter of State of Kerala vs. Cochin Chemical Refineries Ltd.(AIR 1968 SC, 1861), wherein the Hon'ble Supreme Court has held as under :-

> "A transaction of mortgage formally executed does not become void or ineffective merely because the mortgagee fails to advance the amount of money undertaken to be advanced by him. *If without advancing the amount agreed to be advanced, he sues on the title*

> *created under the deed of mortgage, the Court will not award him a decree for anything more than what he has advanced.* But that is not to say that the mortgage is invalid. ”

The learned counsel claimed that the transactions had not become invalid.

The learned counsel for the respondent , per contra, contented that when the possession was not handed over and money was not given the real intention of the parties was not as has been canvassed and claimed by the plaintiff. The document was a mere sham and in any case , in a case where possession was not handed over, in the words of Hon'ble Supreme Court, as quoted herein above in the case of State of Kerala (supra), the only thing which can be asked for is what had been given by the mortgagee. The mortgagee had not passed on the consideration in this case , as has been found by the trial court and , therefore, he cannot ask for the relief which he is seeking.

I have considered the rival submissions .

As per Hon'ble Supreme Court, the plaintiff could, at best, ask for what he had given to the defendant. The possession was not handed over to him. In view of the law laid down by the Hon'ble Supreme Court, herein above in the case of State of Kerala (supra), he could not have asked for more than what he had given. He had not given money and therefore, he was not entitled to any relief. Finding on issue No.2 is liable to be corrected to that extent that since he had had not given money he could not have asked for anything. This Court is conscious that this findings is being altered on the basis of the Hon'ble Supreme Court decision given in the case of State of Kerala (supra). The relief could be granted only if he had given money. Since he had not given anything, no decree could have been granted in his favour for anything more than what he had given and such findings can be recorded by this Court in view of the provisions of CPC as contained in Order 41 Rule 33.

The learned counsel for the appellant drew the attention of the Court towards Order 41 Rule 22, but as the law has been discussed by this Court ,in the aforesaid paras, the decree in favour of the appellant could not be sustained and relief as granted cannot be

granted. In that view of the matter , the appeal fails and also the suit of the appellant fails because he was not entitled to any relief and the suit deserves to be dismissed.

In the result, the appeal and the suit of the appellant is dismissed with no orders as to costs.

(BHAGWATI PRASAD), J.

L.George